Kluwer Arbitration Blog

Accreditation of Arbitrators in India: A New License Requirement?

Ajar Rab (Rab & Rab Associates LLP) · Thursday, October 11th, 2018

The current government in India is undertaking sweeping policy changes to increase India's rank on the global index of ease of doing business. In order to attract more investments, it is also focusing on revamping the ailing judicial system and attempting to bring India at par with global arbitration standards. In pursuance of the same, the Union Cabinet has approved the Arbitration and Conciliation (Amendment Bill 2018) (the "**Bill**") and the New Delhi International Arbitration Centre Bill, 2018 (the "**NDIAC Bill**") which has already been tabled before the Lower House of the Parliament (covered previously in this post).

Highlighting the salient features of the Bill, the Press Information Bureau of India issued a press release stating that the Bill will, *inter-alia*, provide for the creation of an autonomous body called the Arbitration Council of India ("**ACI**") aimed towards grading arbitral institutes and accrediting arbitrators. The press release also noted that the amendments were based on the recommendations of a High-Level Committee under the Chairmanship of Justice B. H. Srikrishna, Retired Judge, Supreme Court of India, which was to provide recommendations and suggestions with respect to "Institutionalisation of Arbitration Mechanism" in India ("**Committee**").

The Bill, *inter-alia*, provides for the insertion of Section 43G in the Arbitration and Conciliation Act, 1996 (the "**Arbitration Act**") specifying the norms for accreditation of arbitrators as provided in the Eight Schedule (to be added to the Arbitration Act). Though there are many instances of an existing gap between cup and lip between the provisions of the Bill and the report of the Committee, Section 43G of the Bill is going to have a severe impact on international arbitration and arbitrators in India.

Section 43G of the Bill states the norms for accreditations shall be as specified in the Eighth Schedule. However, instead of providing an inclusive definition, the Eighth Schedule provides a list of who can be an arbitrator and anyone not falling within the below-mentioned list shall "not be qualified to be an arbitrator":

- *is an advocate within the meaning of the Advocates Act, 1961 having ten years of practice experience as an advocate; or*
- *is a chartered accountant within the meaning of the Chartered Accountant Act, 1949 having ten years' of practice experience as a chartered accountant; or*
- *an officer of the Indian Legal Service; or*
- *an officer with a law degree having ten years' experience in legal matters related to the*

Government, Autonomous Body, Public Sector Undertaking or at a senior level managerial position in private sector; or

- *an officer with an engineering degree having ten years' of experience as an engineer in the Government, Autonomous Body, Public Sector Undertaking, or at a senior level managerial position in private sector or self-employed; or*
- *an officer having senior level experience of administration in the Central or State Government or having experience of senior level management of a Public Sector Undertaking or a Government company or a private company of repute; or*
- *in any other case, a person having educational qualification at degree level with ten years' of experience in scientific or technical stream in the fields of telecom, information technology, Intellectual Property Rights or other specialised areas in the Government, Autonomous Body, Public Sector Undertaking or at a senior level managerial position in a private sector, as the case may be.*

It is pertinent to mention that the Committee report categorically mandated that no new body is to be created for accreditation of arbitrators and instead recognition is to be given to professional institutes which have a robust and well-defined system of accreditation such as the Chartered Institute of Arbitrators (CIArb), the Singapore Institute of Arbitrators (SIArb), the Resolution Institute (RI), or the British Columbia Arbitration or Mediation Institute (BCAMI). Thus, the recommendation of the Committee was to recognize international bodies/professional institutes providing accreditation of arbitrators as their criteria is based on (a) professional education (b) attendance of arbitration hearing (c) qualifying examinations (d) peer interviews/assessment by a panel of approved arbitrators. This would lead to professional and well-qualified arbitrators. While this intent is duly reflected in Section 43D(2)(b) of the Bill which states that one of the functions of the ACI will be to recognize professional institutes providing for accreditation of arbitrators, based on the current wording of Section 43G, it is unclear whether the ACI will simply (i) recognize such institutes; or (ii) recognize such institutes only if the accreditation provided by them meets the criteria mentioned in the Eighth Schedule; or (iii) whether the ACI alone will accredit arbitrators as Section 43G does not provide for recognition of professional institutes for the purposes of accreditation.

It is pertinent to highlight that as per the criteria laid down under the Eighth Schedule, there is no room for any method by which the quality, experience and professional qualification of an arbitrator can be gauged. The Eighth Schedule reflects the conservative and outdated thinking of the government as the criteria relies solely on seniority and a basic professional degree or employment in a government service. None of these are sufficient or even remotely reflective of a person's knowledge of arbitration law or his/her capability to effectively discharge the duties and role of an arbitrator.

The current list provided in the Eighth Schedule assumes that by merely practicing as an advocate or chartered accountant for 10 years, a person is deemed to have gained knowledge in the field of arbitration and can discharge the role of an arbitrator which is judicial in nature. The list gives preference to seniority in managerial positions, matters related to government functions and government enterprises without defining what is the scope and extent of such seniority. Again, fallaciously, the list assumes knowledge of arbitration and basic tenets of justice only on account of age and association with the government or managerial positions in the private sector.

As many internationally renowned arbitrators would testify, mere age or seniority or association with government work does not in any manner equip a person to become an arbitrator. Even as an

advocate with 10 years of practice in India, there is no guarantee that an advocate would actually be well versed in arbitration or that he or she would have handled arbitration matters in those 10 years. Therefore, the result of the Eighth Schedule being passed as a law would be that all those persons mentioned in the Schedule can become accredited arbitrators since there are no other criteria to evaluate their knowledge and understanding of arbitration. The catastrophic result would be accredited arbitrators without any knowledge, education, experience in arbitration law or the practice of arbitration.

The Committee report had specifically stated that the ACI should not be a body which provides accreditation but one that merely recognizes the accreditation provided by international bodies/professional institutes. The establishment of another body for accreditation would only result in duplication of efforts and would involve substantial financial commitment from the government. Despite such a clear recommendation that the ACI is not to become a regulator or a license granting body, the Bill has managed to achieve just that. If the proposed amendment is passed in its current form, it remains unclear if all internationally accredited arbitrators would again require accreditation in India by the ACI or will their existing accreditation be given due recognition, and if so, under what circumstances.

The other problems with Section 43G and the Eighth Schedule are that they fail to account for persons who even though internationally accredited and recognized as arbitrators, may not fall in the list of persons provided in the Eighth Schedule. Furthermore, while most bodies/professional institutes such as the CIArb, SIArb etc. encourage students to enrol and get accreditation as arbitrators, the Eighth Schedule in effect provides an age/seniority threshold which runs counter to the idea of promotion of arbitration.

Unless suitably addressed, creating another body for accreditation would neither benefit nor bolster arbitration in India. In fact, it would just become another certification for arbitrators without any serious reputation in the international market. Moreover, if professional institutes are not recognized, international arbitrators would have to re-apply for accreditation in India before arbitrating disputes in India.

Arbitration was already moving at a snail pace in India and suffered on account of judicial interference at every stage of the arbitration proceedings, the last thing it needed was government interference as well. In effect, the current text of Section 43G and Eight Schedule of the Bill will create more problems for arbitrators and the arbitration landscape in India. Instead of reducing the scope of judicial intervention, the Bill manages to create a new licensing requirement for arbitrators under the garb of providing accreditation.

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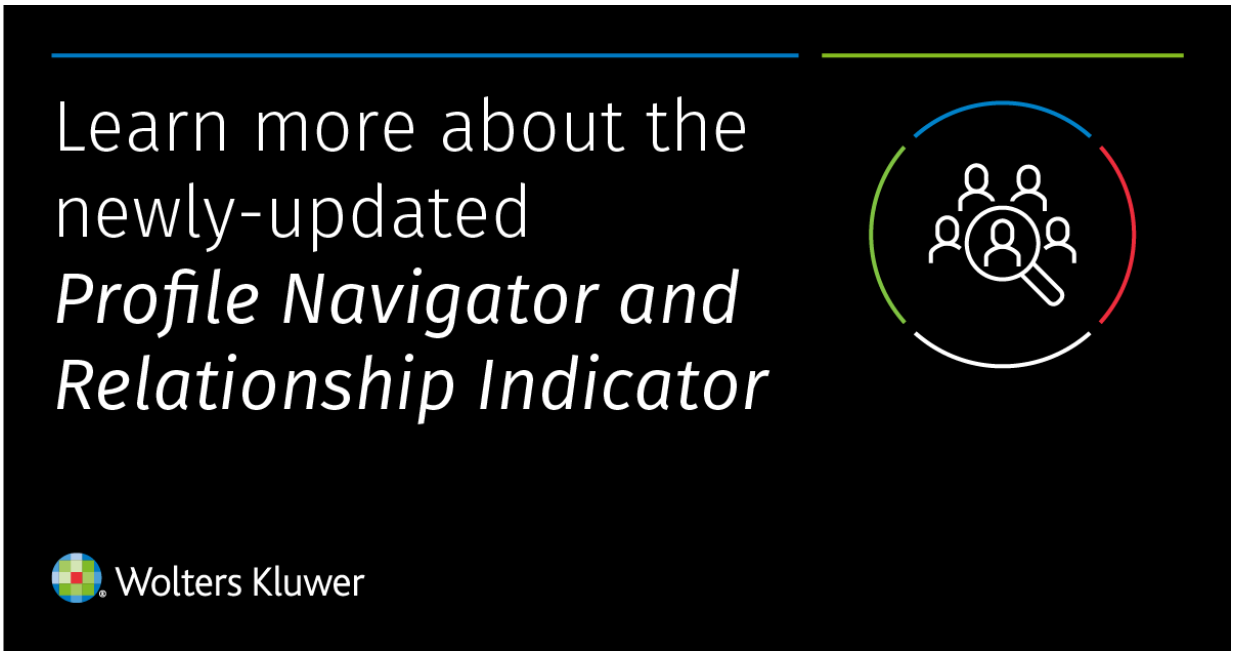

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